89-1759

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1989

A. L. Lockhart, Director,
Arkansas Department of Correction — PETITIONER

V.

William Lloyd Hill — RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Is advice concerning parole eligibility a direct rather than a collateral consequence of a guilty plea?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A.L. Lockhart, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the En Banc Court of Appeals issued after granting Lockhart's petition for rehearing en banc is reported as *Lockhart v. Hill*, 894 F.2d 1009 (8th Cir. 1990) (En Banc). A copy of the opinion is reprinted in slip opinion form in Appendix A to this petition.

The opinion of the panel of the Court of Appeals is reported as *Lockhart v. Hill*, 877 F.2d 698 (8th Cir. 1989). A copy of the opinion is reprinted in slip opinion form in Appendix B to this petition.

The Judgment and Order of the District Court are unreported. They are reprinted in Appendix C to this petition.

The Amended Recommended Findings of Fact and Conclusions of Law issued by the Magistrate are unreported. They are reprinted in Appendix D to this petition.

JURISDICTION

The final judgment of the En Banc Court of Appeals was entered on January 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The respondent, William Lloyd Hill, was charged on November 3, 1978, with first degree murder and theft of property in connection with a theft in excess of $100.00 from and the murder of Darrel Pitts. It was alleged that the crimes were committed on October 1, 1978. On April 6, 1979, Hill entered a negotiated plea of guilty. The plea was accepted by the trial court and Hill was sentenced to thirty-five (35) years imprisonment for first degree murder and to ten (10) years imprisonment for theft of property. The sentences were ordered to be served concurrently for a total thirty-five (35) year sentence.

Rule 36.1 of the Arkansas Rules of Criminal Procedure provides that a criminal defendant may not appeal from a conviction entered upon a plea of guilty. Therefore, Hill had no appeal from his conviction. However, he filed a petition for post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. On October 21, 1980, Hill's Rule 37 petition was denied by the Circuit Court of Pulaski County. He did not appeal to the Arkansas Supreme Court from the circuit court's denial of Rule 37 relief.

On June 30, 1981, Hill filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. *Hill v. Lockhart*, No. PB-C-81-217. On February 28, 1983, the Honorable G. Thomas Eisele filed a Memorandum and Order dismissing the petition and denying the relief sought.

Hill appealed from the denial of habeas corpus relief to the Eighth Circuit Court of Appeals. A divided panel of the Court affirmed the District Court's denial of habeas relief. *Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984). On rehearing, the En Banc Court of Appeals affirmed the judgment of the District Court by an equally divided court. *Hill v. Lockhart*, 764 F.2d 1279 (8th Cir. 1985).

Hill then filed a petition for a writ of certiorari in the United States Supreme Court. Certiorari was granted on March 18, 1985, and on November 18, 1985, this Court affirmed the judgment of the Eighth Circuit Court of Appeals. *Hill v. Lockhart*, 474 U.S. 52 (1985).

Then on January 15, 1986, Hill filed his second habeas corpus petition, the petition now at issue. It is undisputed that the two grounds for relief raised in the second petition are identical to grounds that had been raised in the first habeas corpus petition. When this Court reviewed Hill's first habeas petition, it noted that he "did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis whether or not to plead guilty." *Hill*, 474 U.S. 52, 60 (1985). In his second petition, Hill sought to cure the defect pointed out by this Court.

After Hill filed his second petition, the District Court denied a motion to dismiss the petition as a successive petition pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts and pursuant to 28 U.S.C. § 2244(b).

After the motion to dismiss was denied and an answer was filed, an evidentiary hearing was held on May 22, 1987, before the Honorable John F. Forster, United States Magistrate. The Magistrate first recommended denial of habeas corpus relief. However, the District Court rejected this recommendation and referred the case back go the Magistrate. Upon further consideration, the Magistrate recommended that habeas corpus relief be granted. On July 20, 1988, the District Court adopted the Magistrate's Amended Recommended Findings of Fact and Conclusions of Law and ordered that the writ of habeas corpus issue if the State of Arkansas did not try Hill on the charges of murder and theft within ninety (90) days.

The Eighth Circuit stayed the District Court's judgment pending an appeal.

Lockhart appealed the District Court's judgment granting habeas corpus relief to the Eighth Circuit Court of Appeals. A divided panel of the Eighth Circuit affirmed the District Court's grant of habeas corpus relief. *Lockhart v. Hill*, 877 F.2d 698 (1989). Lockhart then filed a petition for rehearing and rehearing en banc. The Eighth Circuit granted the petition for rehearing en banc and by five to four vote affirmed the District Court's judgment and the result reached by the panel. *Lockhart v. Hill*, 894 F.2d 1009 (8th Cir. 1990) (En Banc).

The Eighth Circuit has stayed the issuance of its mandate during the pendency of this petition for certiorari.

REASONS FOR GRANTING THE WRIT

William Lloyd Hill was charged with first degree murder and theft of property in the Pulaski County Circuit Court in Little Rock, Arkansas in 1978. In 1979, Hill through counsel negotiated a plea to both charges. He received a sentence of 35 years on the first degree murder charge and a concurrent sentence of ten years on the theft of property charge.

In effect at the time of Hill's guilty pleas was a state law governing potential parole eligibility requiring service of a longer term for second offenders before they could become eligible for parole. *See* Ark. Stat. Ann. §§ 43-2828(2) and 43-2829(3) [now codified as Ark. Code Ann. §§ 16-93-603(2) and 16-93-604(3)]. Hill was a second offender under that statute and was not eligible for parole until having served one-half of his sentence with credit for good time. [1] Hill contends that his attorney advised him prior to the entry of his guilty pleas that he would be eligible for parole after serving one-third of his sentence with credit for good time.

When this Court previously reviewed this case, it noted that:

> We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in federal courts.

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1 Hill was paroled from the Arkansas Department of Correction on February 13, 1989.

Hill v. Lockhart, 474 U.S. 52, 56 (1985).

Upon review of a second habeas corpus petition filed in the District Court after this Court affirmed the denial of habeas corpus relief in his first habeas proceeding, the District Court granted habeas corpus relief. The only difference between the two petitions was that in the second petition, Hill cured the defect identified by this Court and claimed that but for his attorney's erroneous advice, he would have pleaded not guilty and would have insisted on going to trial. This time, the District Court granted an evidentiary hearing.

At the evidentiary hearing Hill testified that his attorney had been aware of his prior conviction and that his attorney nevertheless advised him that he would be *eligible* for parole after serving six (6) years of the thirty-five (35) year sentence offered in the plea bargain by the State. Hill's allegation is that the six years was calculated based on his being eligible for parole after serving one-third (⅓) of his sentence with credit for good time which would reduce his sentence further and could result in his being released on parole after serving one-sixth (1/6) of his sentence or in approximately six (6) years.

Lockhart acknowledges that if counsel had been aware of Hill's prior conviction and still advised him that he would be eligible for parole after serving approximately six (6) years, this advice would have been erroneous under Arkansas law. Ark. Stat. Ann. § 43-2829(3) [now codified as Ark. Code Ann. § 16-93-604(3)] provides that second offenders, the classification in which Hill belonged because of his prior conviction in Florida, shall not be eligible for release on parole until a minimum of one-half (½) of their sentence shall have been served, with credit for good-time allowances.

However, even if Hill's attorney incorrectly advised him with respect to his parole eligibility date, Lockhart

asserts that he is still not entitled to habeas corpus relief. When the Eighth Circuit addressed this issue in Hill's first appeal, *Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984), it affirmed the District Court's denial of Hill's habeas corpus petition without an evidentiary hearing. *Id.* 731 F.2d at 572-73. In doing so, the Court assumed for purposes of analysis, that Hill's attorney had misadvised him with respect to his parole eligibility. Even with that assumption, the Eighth Circuit affirmed the District Court's denial of habeas corpus relief. The Court noted:

> Counsel's advice concerning Hill's parole eligibility, even if not wholly accurate, does not amount to constitutionally inadequate performance and is not a dereliction of duty sufficient, by itself, to allow Hill to withdraw his guilty plea.

Hill, 731 F.2d at 572.

The Eighth Circuit, upon consideration of the appeal involving Hill's second habeas corpus petition, affirmed the District Court's grant of habeas corpus relief. The Eighth Circuit reasoned:

> In some situations incorrect advice about parole will be merely a collateral matter, not significant enough to justify habeas relief. A lawyer's incorrect guess as to the actual time of parole, for example, would probably fall into that category. But here the misadvise was of a solid nature, directly affecting Hill's decision to plead guilty. Hill's lawyer had died by the time of the evidentiary hearing in the District Court, thus making it easier for someone to fabricate what the lawyer said, but the District Court believed Hill, and we cannot say that this determination of credibility was clearly erroneous.

Lockhart v. Hill, 894 F.2d 1009, 1010 (8th Cir. 1990) (En Banc). Thus, the Eighth Circuit has suggested that advice about parole is in some circumstances a direct consequence of a guilty plea.

Lockhart asserts that the position taken by the Eighth Circuit has resulted in the interpretation of an important question of federal law which has not been but should be settled by this Court and further that the Eighth Circuit has taken a position in its holding in this case which is in conflict with the decisions of other federal and state courts. That question is whether misadvice concerning parole eligibility can ever invalidate a guilty plea which is otherwise properly made. Lockhart asserts that the issue of parole is a collateral matter and cannot invalidate an otherwise valid guilty plea.

This exact question, in the context of whether Hill was entitled to an evidentiary hearing upon making a claim that he had been misadvised about parole, was the issue upon which this Court granted certiorari in this case when it last came before the Court. However, based upon its finding that Hill had failed to satisfy the "prejudice" requirement of *Strickland v. Washington*, 466 U.S. 668 (1984), this Court found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 60 (1985). It is now appropriate for this Court to answer that question.

In reaching its conclusion in Hill's case, the Eighth Circuit has now aligned itself with the Fourth Circuit in holding that gross misadvice about parole eligibility may invalidate a guilty plea. *See O'Tuel v. Osborne*, 706 F.2d 498 (4th Cir. 1983); *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979).

However, other federal circuits have addressed this issue and have concluded that parole is a collateral matter to a guilty plea and misadvice concerning parole does not invalidate a guilty plea. *See Cepulonis v. Ponte*, 699 F.2d 573 (1st Cir. 1983); *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980); *Trujillo v. United States*, 377 F.2d 266 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967).

In addition to being in conflict with other federal circuits, the Eighth Circuit's most recent holding in Hill's case is in direct conflict with its own prior authority on this issue. The panel that originally heard this case found that the details of parole eligibility were considered collateral rather than direct consequences of a guilty plea. *Hill v. Lockhart*, 731 F.2d 568 (8th Cir.), *aff'd.*, 764 F.2d 1279 (8th Cir. 1984). The Eighth Circuit apparently did not feel constrained by its previous holding in Hill's case because this Court granted certiorari and made its ruling on a narrower ground than the Eighth Circuit had. *Lockhart v. Hill*, 877 F.2d 698, 701, 702 (8th Cir. 1989).

Hill's second habeas petition asserted two grounds for relief. He challenged the voluntariness of his plea and alleged a denial of effective assistance of counsel. The two grounds really assert a single claim for relief under this Court's analysis in *Hill v. Lockhart*, *supra*. This Court made it clear that where a defendant pleads guilty upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. *Id.*, 474 U.S. at 56. Thus, the issue is whether counsel's advice to Hill amounted to ineffective assistance of counsel.

Thus, in order to prevail on his claim of ineffective assistance of counsel, Hill had to establish that he was prejudiced as a result of his attorney's deficient performance. *Hill*, 474 U.S. at 57. To establish prejudice, Hill was required to show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59.

Lockhart asserts that Hill failed to establish that there is a reasonable probability that, but for counsel's alleged inaccurate advice, he would have insisted on going to trial. The difference between the advice that Hill claims that his attorney gave him concerning his parole eligibility and what

in reality he was required to serve before becoming eligible for parole is the difference between approximately 6 years and approximately 9 years.

If Hill had gone to trial, he faced a possible sentence of five to fifty years or life imprisonment. Hill claims that if he had known that he had to serve 9 years before becoming parole eligible instead of 6 years, he would have insisted on going to trial. Lockhart asserts that the 3-year difference does not establish a *reasonable* probability that Hill would have insisted on going to trial when balanced against a possible 50-year or life sentence that he could have received if he had gone to trial.

It is evident that the plea bargain of 35 years was in Hill's best interest. It is not reasonable to believe that the difference between 6 and 9 years incarceration before becoming parole eligible would have caused Hill to reject the plea bargain when he faced a possible 50-year or life sentence [2] if he had gone to trial. This is especially true when one realizes that the issue is reviewed "objectively, without regard for the 'idiosyncrasies of the particular decision maker.'" *Hill v. Lockhart*, 474 U.S. at 59-60, *quoting Strickland v. Washington*, 466 U.S. 668, 695 (1984).

The dissenters at the Eighth Circuit agreed and explained as follows:

> I respectfully dissent. The Court's holding that an admitted killer's first degree murder conviction must be set aside on his say-so that his now-deceased attorney's advice concerning parole eligibility misled him into accepting a plea bargain—one that clearly appears to have been in his best interests—is

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Under Ark. Code Ann. § 16-93-604(b)(1) (1987), if Hill had received a life sentence, he would not have been eligible for release on parole unless the sentence was commuted to a term of years by executive clemency.

not required by the Constitution or by any decision of the United States Supreme Court. Today's holding forgoes objective analysis of Hill's options at the time of his plea bargaining in favor of slippery subjectivity. It opens the door to what may prove to be a flood of similar habeas claims. It represents a step I am not prepared to take.

* * *

I believe our original panel decision was correct in holding that Hill's claim lacks constitutional footing. First, I seriously doubt that the Sixth Amendment ever can be brought into play by allegations of incorrect advice concerning parole eligibility. The subject of parole eligibility, though no doubt of keen interest to the accused, is simply not central to what plea bargaining is all about, namely, the obtaining of either reduced charges, a below-the-maximum sentence, or both. Moreover, even indulging the assumption, without deciding, that a case might be found in which counsel's advice concerning parole eligibility is so far off the mark that the Sixth Amendment right to the effective assistance of competent counsel is violated, in my judgment this is not such a case. The advice given by Hill's counsel certainly was not "gross[] misinform[ation]" on the order of that found in *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (counsel misrepresented parole eligibility of eight and three-quarter years as only one and three-quarters years). For the reasons well-explicated in our 1984 panel opinion, which I will not here restate, I would find no constitutional violation and therefore would reserve the judgment of the District Court.

Lockhart v. Hill, 894 F.2d at 1010, 1011 (Bowman, J., dissenting).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

**Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2237

William Lloyd Hill,	*
	*
Appellee,	*
	* On Appeal from the
v.	* United States District
	* Court for the Eastern
A.L. Lockhart, Director,	* District of Arkansas.
Arkansas Department of	*
Correction,	*
	*
Appellant.	*

Submitted: September 12, 1989

Filed: January 31, 1990

Before LAY, Chief Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges, en banc.

ARNOLD, Circuit Judge.

William Lloyd Hill, a state prisoner serving a 35-year sentence, brings this petition for habeas corpus under 28

U.S.C. § 2254. The District Court [1] granted relief, ordering that Hill be released unless the State affords him a trial. A panel of this Court affirmed, and we then granted the State's petition for rehearing with suggestions for rehearing en banc, thus vacating the panel opinion.

We now affirm, adopting the reasoning contained in the panel decision. *Hill v. Lockhart*, 877 F.2d 698 (1989). The District Court did not abuse its discretion in hearing Hill's second habeas petition, because there had been no final determination on the merits of Hill's first petition. And the erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), rendering Hill's plea invalid and entitling him to a trial.

We are careful to note that not every instance of a lawyer's failure to inform a client accurately of parole eligibility will reach the level of a constitutional violation. As detailed in the panel opinion, in this case there is a reasonable probability that the result of the plea process would have been different but for the erroneous information:

> Not only had Hill explicitly asked his counsel about the parole system in Arkansas, Tr. 23, but he had made clear that the timing of eligibility was the dispositive issue for him in accepting or rejecting a plea bargain. He told his attorney that he considered it no bargain to forego a trial unless his eligibility would be sooner than seven years, which he understood to be the time he could serve with commutation of a life sentence. Tr. 24-26. The Plea Statement bears the signature of Hill's counsel, immediately below the words: "His plea of guilty is consistent with the facts he has related to me and

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1 The Honorable Garnett Thomas Eisele, Chief Judge, United States District Court for the Eastern District of Arkansas.

> with my own investigation of the case." J.A. 57. Given the attorney's knowledge of his client's particular concern, a failure to check the applicable law was especially incompatible with the objective standard of reasonable representation in *Strickland.*

877 F.2d at 703.

In some situations incorrect advice about parole will be merely a collateral matter, not significant enough to justify habeas relief. A lawyer's incorrect guess as to the actual time of parole, for example, would probably fall into that category. But here the misadvice was of a solid nature, directly affecting Hill's decision to plead guilty. Hill's lawyer had died by the time of the evidentiary hearing in the District Court, thus making it easier for someone to fabricate what the lawyer said, but the District Court believed Hill, and we cannot say that this determination of credibility was clearly erroneous. For a situation with some similarity, *cf. Blair v. McCarthy,* 881 F.2d 602 (9th Cir. 1989) (defendant not told of mandatory parole term to follow sentence of probation; defendant would have pleaded not guilty had he been told; guilty plea set aside on habeas).

We sustain the result reached by the panel, and the judgment of the District Court is

Affirmed.

BOWMAN, Circuit Judge, joined by JOHN R. GIBSON, WOLLMAN, and MAGILL, Circuit Judges, dissenting.

I respectfully dissent. The Court's holding that an admitted killer's first degree murder conviction must be set aside on his say-so that his now-deceased attorney's advice concerning parole eligibility misled him into accepting a plea bargain—one that clearly appears to have been in his best interests—is not required by the Constitution or by any decision of the United States Supreme Court. Today's

holding foregoes objective analysis of Hill's options at the time of his plea bargaining in favor of slippery subjectivity. It opens the door to what may prove to be a flood of similar habeas claims. It represents a step I am not prepared to take.

Based on the facts as found by the District Court (which credited Hill's self-serving testimony), Hill's attorney advised him that, with good behavior, he could be eligible for parole after serving only six years of the thirty-five year sentence offered in the plea bargain. In reality, since Hill was a second offender, he could not become eligible for parole in less than eight years and nine months. In testimony the District Court accepted as true, Hill asserted that but for the erroneous parole eligibility advice from his attorney he would not have pleaded guilty and would have gone to trial, even though trial would have exposed him to a possible sentence of five to fifty years or life imprisonment, and even though on a sentence of life imprisonment he would have had no possibility of parole unless the Governor were somehow persuaded to commute the sentence to a term of years.

I agree we cannot say the District Court's findings are clearly erroneous. I disagree, however, with the conclusion that these findings establish constitutionally inadequate performance by Hill's attorney.

The claim that Hill asserts in the present proceeding is identidal to the claim he made, and we rejected, over five years ago. *See Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984). The reasoning of that decision, which assumed all the facts the District Court now has found, is as persuasive to me now as it was then. In affirming the District Court's denial of habeas relief, we expressly held that counsel's advice concerning Hill's parole eligibility, even though not entirely accurate, did not amount to constitutionally inadequate performance. *Id.* at 572. Rehearing en banc was granted, and the panel decision thereby was vacated. On rehearing,

however, the en banc Court affirmed the District Court by an equally divided vote, thus sustaining the result reached by the panel decision. 764 F.2d 1279 (8th Cir. 1984) (en banc).

Our en banc decision was affirmed by the Supreme Court on procedural grounds. *See Hill v. Lockhart*, 474 U.S. 52 (1985). Holding merely that Hill's allegations were insufficient to satisfy the "prejudice" requirement of *Strickland v. Washington*, 466 U.S. 668 (1984), the Court found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel." 474 U.S. at 60. The Supreme Court thus declined to decide the constitutional merits of Hill's claim.

I believe our original panel decision was correct in holding that Hill's claim lacks constitutional footing. First, I seriously doubt that the Sixth Amendment ever can be brought into play by allegations of incorrect advice concerning parole eligibility. The subject of parole eligibility, though no doubt of keen interest to the accused, is simply not central to what plea bargaining is all about, namely, the obtaining of either reduced charges, a below-the-maximum sentence, or both. Moreover, even indulging the assumption, without deciding, that a case might be found in which counsel's advice concerning parole eligibility is so far off the mark that the Sixth Amendment right to the effective assistance of competent counsel is violated, in my judgment this is not such a case. The advice given by Hill's counsel certainly was not "gross[ ] misinform[ation]" on the order of that found in *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (counsel misrepresented parole eligibility of eight and three-quarter years as only one and three-quarters years). For the reasons well-explicated in our 1984 panel opinion, which I will not here restate, I would find no

constitutional violation and therefore would reverse the judgment of the District Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2237

William Lloyd Hill,	*
	*
Appellee,	*
	* On Appeal from the
v.	* United States District
	* Court for the Eastern
A.L. Lockhart, Director,	* District of Arkansas.
Arkansas Department of	*
Correction,	*
	*
Appellant.	*

Submitted: January 9, 1989

Filed: June 14, 1989

Before McMILLIAN, ARNOLD, and BOWMAN, Circuit Judges.

ARNOLD, Circuit Judge.

The District Court [1] granted habeas corpus relief to William Lloyd Hill, who is under a sentence of 35 years for murder and theft. A.L. Lockhart, Director of the Arkansas Department of Correction, appeals. He argues (1) that the Court should have dismissed Hill's successive habeas petition pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases and *Sanders v. United States*, 373 U.S. 1 (1963), and (2) that the Court erred in ruling that Hill's guilty plea was involuntary, and therefore invalid, as a result of constitutionally inadequate advice by counsel regarding parole eligibility, entitling Hill to a trial. We affirm. In hearing Hill's second petition, the District Court did not abuse its discretion, because there had been no final determination on the merits of Hill's first petition. And the erroneous parole eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), rendering Hill's plea invalid.

I.

Hill was charged with first-degree murder and theft of property occurring on October 1, 1978. He pleaded guilty in the Circuit Court of Pulaski County, Arkansas, on April 6, 1979, explaining to the Court that he and Darrel Pitts had been to a bar, and Pitts had "hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him." J.A. 53. Hill said he shot Pitts and fled the state with Pitts's car and gun. The Court accepted Hill's plea and sentenced him to concurrent sentences of 35 years for the murder and 10 years for the theft.

Prior to his plea hearing, Hill had asked his appointed counsel about his potential sentence and parole eligibility

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[1] The Hon. Garnett Thomas Eisele, Chief Judge, United States District Court for the Eastern District of Arkansas.

under Arkansas law. Tr. 23. His attorney told him that he faced a sentence of five to fifty years or life, and that he would be eligible for parole after serving one-third of his sentence, with time off for good behavior. [2] In fact, Ark. Stat. Ann. §§43-2828, 43-2829 (1977), [3] known as "Act 93," required individuals with prior convictions to complete not one-third but one-half of their sentences, with time off for good behavior. Mr. Hill, who had been convicted of burglary in Florida in 1978, apprised his counsel of that prior conviction at the outset of their first meeting (Tr. 21, 29), but his counsel never mentioned Act 93 or its effect on Hill's parole eligibility.

During plea negotiations, Hill rejected a proposal by the prosecution for a 45-year prison term in exchange for a guilty plea because his lawyer told him that with such a sentence he would be eligible for parole in "about nine years. And I told him that I couldn't see how that would be in my benefit to take that sentence because it was my understanding that people were getting out from life sentences [as a result of executive clemency] after only serving seven years, and he said that that was true." Tr. 24-25. Hill testified that he understood commutations of life sentences to be fairly commonplace, though not guaranteed. Tr. 30-32. [4] Using seven years as his benchmark, Hill then accepted the prosecution's subsequent offer of a 35-year sentence in exchange for his plea of guilty, since his counsel had told him that his parole eligibility would then be six years (Tr. 26, 29), and had advised him to accept that offer. Presumably, counsel calculated as follows: one-third of a 35-year term is approximately twelve years, and with optimal behavior, Hill could be out in six years. However, as

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Ark. Stat. Ann. §46-120 (Repl. 1977) provided that an inmate's good behavior can produce a sentence reduction of thirty days for every thirty days actually served.

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These statutes have been recodified as A.C.A. §§16-93-602, 603, and 604 (1987).

a second offender, Hill actually must serve one-half of the 35-year term (approximately eighteen years), so that with the maximum time off for good behavior, his earliest parole eligibility is slightly less than nine years, the very term he had rejected when he turned down the 45-year bargain first offered him.

The judge at the plea hearing reinforced Hill's misconception by stating, "[i]t is agreed under the negotiated plea. You will be required to serve at least one-third of your time before you are eligible for parole." J.A. 55. The judge never asked Hill if he had any prior convictions. [5]

As soon as Hill received notice that he would have to serve a minimum of nine years, rather than the six he had been told, he contacted the prison records office to check on what he thought must be a mistake. When that office informed him that he was subject to Act 93, Hill tried to get in touch with his lawyer, who never responded to his inquiry. Hill then attempted to do his own research on Act 93, and filed an unsuccessful Rule 37 petition for post-conviction relief in state court. Next, he filed a *pro se* habeas corpus petition in federal district court. On February 28, 1983, that petition, too, was denied, along with Hill's request for an evidentiary hearing. The District Court

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At the time, this was a correct perception, or at least one widely shared by the bar. Commutations of life sentences have become less frequent in recent years.

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The judge may have assumed from the plea statement which Hill signed that he had no criminal record. But that statement, which reads, "You are charged with a felony and with 0 prior convictions" (J.A. 57), indicates only that no former offenses were part of Hill's present charge, as could have occurred using the Habitual Offender Act. See Dist. Ct. Order of April 5, 1988, n.l, J.A. 72, and uncontradicted testimony, Tr. 14-16. The Habitual Offender Act, Ark. Stat. Ann. §41-1001 (Repl. 1977), produces a longer formal sentence. Act 93, on the other hand, affects parole eligibility after the sentence, whatever it is, has been pronounced.

decided that the alleged error regarding Hill's parole-eligibility date was not of such consequence as to render Hill's plea involuntary or his counsel's performance constitutionally inadequate. *Hill v. Lockhart*, No. PB-C-81-217 (E.D. Ark. 1983).

Hill appealed that denial to this Court, which affirmed on April 9, 1984, by a divided vote. *Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984). The majority agreed with the District Court that the alleged misadvice given to Hill did not rise to the level of a deprivation of the constitutional right to counsel. It reasoned that Hill had been told by the state trial judge that he would have to serve at least one-third of his sentence (approximately twelve years) before becoming parole eligible. Since Hill would actually be eligible in nine years, he was no worse off than the judge had suggested. [6] The Court characterized Hill's challenge as involving "details of parole eligibility [which] are considered collateral rather than direct consequences of a plea," and noted that "a defendant need not be informed [of them] before pleading guilty." *Id.* at 570. Without proof of "gross misinformation" on the order of that found in *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (where counsel misrepresented parole eligibility of eight and three-quarters years as one and three-quarters years), the Court would not find constitutionally ineffective assistance. *Hill, supra*, 731 F.2d at 571. The dissent argued that the error in Strader's and Hill's cases was the same -- counsel's failure to look up the applicable law and advise his client of the correct eligibility date. *Id.* at 573-74 (Heaney, J., dissenting).

This Court granted Hill's petition for rehearing en banc, thereby vacating the three-judge panel's decision. The en banc Court affirmed the District Court's denial of habeas relief by an equally divided vote on September 20, 1984. *Hill v. Lockhart*, 764 F.2d 1279 (8th Cir. 1984) (en banc). Hill then

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Of course, the fallacy in this logic is that credit for good time is factored in on the one hand but not on the other.

took his case to the United States Supreme Court, which affirmed our judgment on November 18, 1985, but did so on procedural grounds, declining to reach the merits. *Hill v. Lockhart*, 474 U.S. 52 (1985). The Court applied the test of *Strickland v. Washington*, *supra*, for evaluating ineffective assistance of counsel claims, to the context of guilty-plea challenges. *Hill*, *supra*, 474 U.S. at 58. The Court did not determine if Hill's claim met the first part of the *Strickland* test—i.e., whether or not the representation he received "fell below an objective standard of reasonableness," *id.* at 57 (quoting *Strickland*, *supra*, 466 U.S. at 688)—because the Court decided that Hill's pleadings failed to allege the "prejudice" required by the second part of the *Strickland* test. Hill's *pro se* habeas petition did not explicitly allege that he was prejudiced by his attorney's error, in the sense that he would have elected to go to trial had counsel accurately informed him of his parole-eligibility date under the proposed sentence. According to the Supreme Court, Hill "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Hill*, *supra*, 474 U.S. at 60.

Following the Supreme Court's ruling based on the procedural defect in his first petition, Hill filed another habeas petition, which sought to cure that defect with a more specific allegation of prejudice. The District Court, on July 28, 1986, denied the state's motion to dismiss Hill's successive petition as an abuse of the writ under 28 U.S.C. §2244(b) and Rule 9(b) of the Rules Governing Section 2254 Cases. J.A. 37. On May 22, 1987, a United States Magistrate [7] conducted an evidentiary hearing at which Hill and an expert witness testified about the adequacy of Hill's counsel and the prejudicial impact of his erroneous advice. The Magistrate, believing the earlier Eighth Circuit panel

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The Hon. John F. Forster, Jr., United States Magistrate for the Eastern District of Arkansas.

decision on the merits to be binding, submitted a recommendation on January 29, 1988 to deny habeas relief. J.A. 63. But the District Court, by order of April 5, 1988, returned the case to the Magistrate for additional findings, since it did not agree that the prior Court of Appeals decision was controlling. J.A. 70. The Magistrate then submitted Amended Findings of Fact and Conclusions of Law and a recommendation for habeas relief, on June 28, 1988. J.A. 75. These were adopted by the District Court on July 19, 1988, entitling Hill to be tried within ninety days or be released according to the writ. *Hill v. Lockhart*, No. PB-C-86-25 (E.D. Ark. 1988). We stayed this order pending appeal.

II.

The District Court did not commit an abuse of discretion by reconsidering Hill's case, this time with a full evidentiary hearing. According to Rule 9(b) of the Rules Governing Section 2254 Cases, "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . " This rule grew out of the standard set in *Sanders, supra*, 373 U.S. at 15:

> Controlling weight may be given to denial of a prior application for federal habeas corpus . . . relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Both Rule 9(b) and *Sanders* concern the appropriateness of denying a successive petition; neither prohibits a judge from exercising discretion to *Grant* a hearing. [8]

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The State argues, as well, for dismissal under 28 U.S.C. §2244(b), which also uses discretionary language: "a subsequent application for a writ of habeas corpus . . . *need not* be entertained . . . " (emphasis added).

Moreover, while Hill's first and second petitions raise essentially the same grounds, he never got a final determination on the merits of his first petition. The initial opinion of the District Court and that of the three-judge panel do reach the merits of Hill's ineffective-assistance claim. However, we vacated the panel decision by granting Hill's petition for rehearing en banc, and the Supreme Court superseded the District Court's discussion on the merits by affirming the denial of habeas relief on a procedural ground.

The Supreme Court granted Hill certiorari to resolve the conflict between his case and *Strader, supra* (where the petitioner won habeas relief), but it decided to reserve consideration of the merits because of Hill's failure to allege facts which, if true, would entitle him to relief.

> We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice."

Hill, supra, 474 U.S. at 60. As the Supreme Court explained in similar circumstances in *Sanders, supra*, 373 U.S. at 19, "the denial, thus based, was not on the merits. It was merely a ruling that petitioner's pleading was deficient." And the concurrence in *Hill*, which disagreed about the sufficiency of the pleadings and went on to discuss the merits, strongly supports the District Court's ultimate decision to grant habeas relief.

> [H]ad the petitioner's attorney known of a prior conviction and still informed petitioner that he would be eligible for parole after serving one-third of his sentence[,] petitioner would be entitled to an evidentiary hearing and an opportunity to prove that counsel's failure to advise him of the effect of

> Ark. Stat. Ann. §43-2829B(3) (1977) amounted to ineffective assistance of counsel. The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis adopted by the majority, as such an omission cannot be said to fall within "the wide range of professionally competent assistance" demanded by the Sixth Amendment. *Strickland v. Washington, supra,* at 690.

Hill, supra, 474 U.S. at 62 (White, J., concurring, joined by Stevens, J.).

Finally, we reject the state's appeal to the doctrines of *res judicata* and law of the case. *Res judicata* as such does not apply in habeas proceedings, and the only "law of the case"—assuming that doctrine would apply—is the Supreme Court's holding that Hill's first habeas petition was deficient as a matter of pleading.

The District Court did not abuse its discretion in entertaining this second habeas petition.

III.

Turning to the merits, we affirm the District Court's determination that Hill's counsel was constitutionally ineffective and that his erroneous advice affected the outcome of the plea process, entitling Hill to withdraw his guilty plea and have his case heard at trial. To be valid, a plea must represent a voluntary and intelligent choice among the alternatives available to the defendant. *North Carolina v. Alford,* 400 U.S. 25, 31 (1970). "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill, supra,* 474 U.S. at 56 (quoting *McMann v. Richardson,* 397 U.S. 759, 771 (1970)).

The failure of Hill's lawyer to ascertain, through minimal research, the applicable statute governing parole eligibility for second offenders, and to inform his client accurately when asked about that eligibility, fell below the objective standard of reasonableness required by the Sixth Amendment. We agree with Hill's expert witness [9] that the "earliest potential parole eligibility date . . . [is] normally one of the most important factors to a criminal client." Tr. 11. The basic minimum amount of time that a defendant will have to serve is an integral factor in plea negotiation; it is a direct, not a collateral, consequence of the sentence. While the state has no federal constitutional duty to inform a defendant about parole, see *Hill, supra*, 474 U.S. at 56, counsel owes a duty to provide accurate information about his client's earliest possible release date, especially when the client asks for it.

The statute which requires Hill to serve one-half rather than one-third of his sentence, with credit for good time, is not like other factors (e.g., "petitioner's behavior and legislative and administrative changes in parole eligibility rules," *Hill, supra*, 731 F.2d at 572) that may affect Hill's eligibility date down the road. [10] To advise his client correctly, the lawyer needed no crystal ball; he had only to consult the Arkansas Statutes and determine the provision applicable to second offenders. See *Strader, supra*, 611 F.2d at 63, and *O'Tuel v. Osborne*, 706 F.2d 498, 499 (4th Cir. 1983). Act 93, which had been in effect for over two years by the time Hill pleaded guilty, posed no special research challenge.

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An experienced criminal defense attorney and past president of the Arkansas Association of Criminal Defense Lawyers.

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Hill understood, when he entered his plea, that actual release on parole was not guaranteed. Tr. 31.

Not only had Hill explicitly asked his counsel about the parole system in Arkansas, Tr. 23, but he had made clear that the timing of eligibility was the dispositive issue for him in accepting or rejecting a plea bargain. He told his attorney that he considered it no bargain to forego a trial unless his eligibility would be sooner than seven years, which he understood to be the time he could serve with commutation of a life sentence. Tr. 24-26. The Plea Statement bears the signature of Hill's counsel, immediately below the words: "His plea of guilty is consistent with the facts he has related to me and with my own investigation of the case." J.A. 57. Given the attorney's knowledge of his client's particular concern, a failure to check the applicable law was especially incompatible with the objective standard of reasonable representation in *Strickland*.

As for the other component of the *Strickland* test, the District Court's finding of prejudice is hardly clearly erroneous. The judgment that Hill's plea would have been different but for the misadvice he received was well-supported by the record. [11] At the evidentiary hearing, Hill's testimony regarding his conversations with counsel, including those focused on the parole-eligibility dates, went unchallenged. The judge asked Hill: "If [your attorney] had advised you that you would have to do around nine years before you could possibly be paroled, would you have entered the plea?" Tr. 26. Hill responded: "No, sir, I wouldn't, and the reason was just because I at the time believed that I'd have just as good a chance on a life sentence of getting out before nine years." *Id.*

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This part of the *Strickland* test is evaluated subjectively, not objectively. That is, it does not matter whether a reasonable person would have pleaded differently, given the correct information of nine, instead of six, years. What counts is the likelihood that Hill would have pleaded differently.

Hill's rejection of the initially offered 45-year sentence, which he thought carried a nine-year parole-eligibility date, and his subsequent acceptance of the 35-year offer, with the six-year parole eligibility his lawyer described, further support the finding of prejudice. Had Hill known that the 35-year sentence really involved nine-year eligibility for him, it seems reasonably probable that he would have declined to plead guilty in exchange for that sentence.

To succeed under *Strickland*, Hill need not show prejudice in the sense that he probably would have been acquitted or given a shorter sentence at trial, but for his attorney's error. [12] All we must find here is a reasonable probability that the result of the plea process would have been different—that Hill "would not have pleaded guilty and would have insisted on going to trial," *Hill, supra*, 474 U.S. at 59—if counsel had given accurate advice. We uphold the District Court's finding that Hill suffered prejudice as a result of the ineffective counsel he received. [13]

Affirmed.

BOWMAN, Circuit Judge, dissenting.

Although I agree we cannot say that the District Court abused its discretion by reconsidering Hill's case, I

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Sometimes, a court must consider how prejudicial the error would have been at trial—e.g., when an attorney fails to consider a possible affirmative defense, and accordingly advises the client to plead guilty. See *Hill, supra*, 474 U.S. at 59.

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We believe that recently Hill was approved for parole. The relief he will receive under our opinion is a trial. If he is found guilty, he could receive a more severe sentence than the 35 years he got in the first place. It is possible, then, that he could be reimprisoned, even for life. At the oral argument, appointed counsel assured us that Hill is aware of this danger and wishes to press his claim for relief even so. We are grateful to appointed counsel for his diligent service in this case.

respectfully disagree with the conclusion that Hill is entitled to habeas corpus relief.

The identical claim that Hill now asserts was rejected by our Court over five years ago. *See, Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984). In that decision, we affirmed the District Court's denial of habeas relief, and we expressly held that counsel's advice concerning Hill's parole eligibility, even though not entirely accurate, did not amount to constitutionally inadequate performance. *Id.* at 572. Rehearing en banc was granted, and the panel decision thereby was vacated. On rehearing, however, the en banc Court affirmed the District Court by an equally divided vote, thus sustaining the result reached by the panel decision. 764 F.2d 1279 (8th Cir. 1984) (en banc).

Our en banc decision was affirmed by the Supreme Court on procedural grounds. *See Hill v. Lockhart*, 474 U.S. 52 (1985). Holding merely that Hill's allegations were insufficient to satisfy the "prejudice" requirement of *Strickland v. Washington*, 466 U.S. 668 (1984), the Court found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel." 474 U.S. at 60. The Supreme Court thus declined to decide the constitutional merits of Hill's claim.

I believe our original panel decision was correct in holding that Hill's claim lacks constitutional footing. First, I seriously doubt that the Sixth Amendment ever can be brought into play by allegations of incorrect advice concerning parole eligibility. The subject of parole eligibility, though no doubt of keen interest to the accused, is simply not central to what plea bargaining is all about, namely, the obtaining of either reduced charges, a below-the-maximum sentence, or both. Moreover, even indulging in the assumption, without deciding, that a case might be found in which counsel's advice concerning parole eligibility

is so far off the mark that the Sixth Amendment right to the effective assistance of competent counsel is violated, in my judgment this is not such a case. For the reasons well-explicated in our 1984 panel opinion, which I will not here restate, I would find no constitutional violation and therefore would reverse the judgment of the District Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

WILLIAM LLOYD HILL PLAINTIFF

v. CASE NO. PB-C-86-25

A. L. LOCKHART, Director,
Arkansas Department of Correction DEFENDANT

JUDGMENT

Pursuant to the Order entered July 20, 1988 adopting the Magistrate's Amended Findings and Recommendations,

IT IS CONSIDERED, ORDERED AND ADJUDGED that this Petition be, and it is hereby, dismissed with prejudice. The State of Arkansas will try the petitioner within 90 days of the Court's Order adopting the Magistrate's Amended Findings and Recommendations or the writ shall issue.

Dated this 28th day of July, 1988.

/s/ Garnett Thomas Eisele
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

WILLIAM LLOYD HILL PETITIONER

v. CASE NO. PB-C-86-25

A. L. LOCKHART, Director,
Arkansas Department of Correction Respondent

ORDER

The Court has received the "Amended Recommended Findings of Fact and Conclusions of Law" from Magistrate John F. Forster, Jr. After carefully reviewing same, the Court adopts the Magistrate's factual findings in their entirety. The Court notes that the Magistrate found that:

> Petitioner would not have pleaded guilty but for the erroneous parole advice from his attorney; and that he was prejudiced by so doing because of the drastic difference between what he was led to expect and the reality of his parole possibilities.

Apparently this testimony went unchallenged. The Court notes that the petitioner's attorney is now deceased.

The Court first points out that this problem will only arise in those courts which permit this type of plea bargain. Where *the Court* fixes the penalty completely on its own, the attorney's possible misrepresentation concerning parole eligibility will be of no consequence because the guilty plea will be taken before the sentence is even considered.

It further occurs to the Court that, even in the plea bargain context, this problem can be avoided if the Court makes proper inquiries at the time of the arraignment and the taking of the guilty plea. The Court could inquire of the defendant if any representations had been made to the defendant by the state or his own counsel as to any possible parole eligibility dates. If so, that information could be spread on the record and its accuracy verified before the plea was accepted.

The legal questions presented here are close ones as indicated by the difficulty that both the Eighth Circuit Court of Appeals and the U.S. Supreme Court had therewith. Nevertheless, the Court is convinced that, under

the present state of the law, and accepting the Magistrate's factual findings, the conclusion must follow that the petitioner is entitled to a trial just as if he had entered a "not guilty" plea to the charges against him. The Magistrate was obviously impressed with the fact that the defendant turned down a proposed term of 45 years before accepting what amounted to a term of 35 years.

IT IS THEREFORE ORDERED that the State of Arkansas shall try the petitioner on the charges underlying his murder and theft convictions within ninety (90) days of the date of this Order, or the writ shall issue.

Dated this 19th day of July, 1988.

/s/ Garnett Thomas Eisele
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

WILLIAM LLOYD HILL — PETITIONER

vs. CASE NO. PB-C-86-25

A. L. LOCKHART, Director,
Arkansas Department of Correction — RESPONDENT

AMENDED
RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The sole issue in this habeas corpus case is whether erroneous advice by counsel as to parole eligibility constitutes ineffective assistance of counsel rendering a guilty plea invalid. The magistrate concludes that it does. Therefore, the Petitioner's application for a writ of habeas corpus should be granted.

This is Petitioner's second federal habeas action. His first petition involved the same issue presented here and was resolved against the Petitioner. *Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984) (*Hill I*) (holding that erroneous legal advice concerning parole eligibility does not constitute ineffective counsel). The United States Supreme Court granted *certiorari* and affirmed on procedural grounds only, stating in a concurring opinion that if properly pleaded under the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), the conduct alleged would violate the 6th Amendment. See *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985).

In view of the statements contained in the Supreme Court's decision, Petitioner has refiled his habeas claim

specifically alleging that he received erroneous advice about parole eligibility from his attorney in 1979 when he pleaded guilty to first degree murder and theft of property in Pulaski County, Arkansas, resulting in a 35-year prison sentence. Petitioner alleges further that he would not have pleaded guilty but for his attorney's erroneous advice, and that he was prejudiced as a result.

The Respondent's motion to dismiss the instant petition as an abuse of the writ under Rule 9 of the *Rules Governing §2254 Cases in the United States District Courts* was denied. An evidentiary hearing was conducted on May 22, 1987. After receiving written briefs by the parties, the case was submitted for decision on December 3, 1987.

As a preliminary issue that might prove dispositive of Petitioner's claims, Respondent urged the Court to hold that the Eighth Circuit's previous ruling in *Hill I* forecloses reconsideration of Petitioner's claim in the instant petition. By order of April 5, 1988, the District Court rejected this proposition. Therefore, the magistrate must determine (1) whether the performance of Petitioner's attorney was "objectively reasonable" and, if not, (2) whether Petitioner was "prejudiced" by the attorney's failure to perform in an objectively reasonable manner. See *Strickland*, supra.

FACTS

The magistrate finds the following to be the material facts. Petitioner was charged with one count of first degree murder and one count of theft in Pulaski County, Arkansas, on November 13, 1978. [1] He was represented by William

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The felony information alleged that on October 1, 1978, Petitioner killed Darrel Pitts by shooting him and took property belonging to Pitts worth over $100.00. Under *Ark. Stat. Ann.* §41-1502(3), first degree murder is a Class A felony. Theft of property worth over $100.00 is a Class C felony. *Ark. Stat. Ann.* §2203(b)(i).

Patterson, Jr., a Deputy Public Defender, who is now deceased. Mr. Patterson inquired about Petitioner's prior felony convictions and was told that Petitioner had been previously convicted of burglary in the State of Florida on March 1, 1978.

Under Arkansas statutes in effect on October 1, 1978, when the crimes were committed, the penalty for first degree murder was a term of imprisonment ranging from five (5) to fifty (50) years, or life. *Ark. Stat. Ann.* §41-901(1)(a) (1977). The penalty for theft of property was a term of imprisonment ranging from two (2) to ten (10) years. *Ark. Stat. Ann.* §41-901(1)(c) (1977). During plea negotiations, the prosecuting attorney offered Petitioner a prison term of 45 years in exchange for a guilty plea. The prosecutor later offered Petitioner concurrent sentences of 35 years and 10 years for guilty pleas to his murder and theft charges respectively. Petitioner accepted this offer upon the advice of his attorney.

In the process of deciding whether to accept the plea offer, Petitioner asked his attorney when he would be eligible for parole. The attorney told him that he would be eligible for parole within six (6) years, with good behavior. [2] Petitioner testified that he rejected the 45-year offer because the attorney told him that it would take nine (9) years to become parole eligible under a 45-year sentence. The legal perimeters of parole eligibility were a fundamental component in Petitioner's decision-making process concerning whether to accept or reject an offer of a particular term of years in prison in exchange for a negotiated plea of guilty to the criminal charges. Petitioner testified that he would have gone to trial rather than

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Under *Ark. Stat. Ann.* §46-120 (Repl. 1977), Arkansas inmates may become eligible, by good behavior, to receive credits of 30-day sentence reductions for every 30 days actually served, effectively reducing both the actual length of confinement required to complete a sentence and to become eligible for parole.

voluntarily accept any sentence from which he could not, under optimum conditions and his best behavior, have achieved parole eligibility in less than seven (7) years. Petitioner entered the guilty plea because his attorney advised him that he could achieve parole eligibility under a 35-year sentence in six (6) years, with good behavior.

The attorney's advice was incorrect. Petitioner was a second offender because of his previous felony conviction in Florida. *Ark. Stat. Ann.* §41-1002 (Repl. 1977). The attorney knew this and considered the previous felony while advising Petitioner that he was not likely to be charged as a repeat offender. See *Ark. Stat. Ann.* §41-1001 (Repl. 1977). However, the attorney did not correctly advise Petitioner of his potential parole eligibility under Act 93 of 1977, effective on April 1, 1977, codified as *Ark. Stat. Ann.* §§43-2828, 43-2829. [3] Act 93 changed the amount of time that an offender must serve in prison before becoming parole eligible, for persons committing crimes after April 1, 1977, from the amount of time required under prior law.

Prior to April 1, 1977, a second offender could become eligible for parole after serving one-third (1/3) of his sentence, with credit for good time allowances. Persons convicted of crimes committed prior to April 1, 1977, are entitled to have their parole eligibility computed under this formula. See *Ark. Stat. Ann.* §43-2807 (Repl. 1977), recodified as A.C.A. §16-93-601 (1987). Thus, a person who was a second offender, serving a 35-year prison term for a crime committed prior to April 1, 1977, could become eligible for parole in approximately six (6) years if he

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These statutes have been recodified as A.C.A. §§16-93-603, 16-93-604 (1987).

received the maximum amount of good-time credit possible. [4]

Effective April 1, 1977, the Arkansas Legislature changed the amount of time that a second offender, who committed a crime after that date, would have to serve before becoming eligible for parole. Act 93, codified originally as *Ark. Stat. Ann.* §§43-2828, 43-2829, recodified in 1987 as A.C.A. §§16-93-602, 603 and 604, requires a second offender to serve one-half (½) of his sentence before becoming parole eligible.

Petitioner was charged with having committed a crime on October 1, 1978, eighteen (18) months after the effective date of Act 93. Thus, in order for him to become parole eligible under a 35-year prison sentence, he must serve or receive credit for 17 years and six (6) months of imprisonment. Receiving the maximum amount of good time credits allowed, he could not become parole eligible in less than eight (8) years and nine (9) months.

APPLICABLE LAW

The test for determining the validity of a guilty plea is whether the plea represented a voluntary and intelligent choice among the alternatives available to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970). A defendant who was represented by counsel may successfully attack, and have stricken as involuntary and unintelligent, a guilty plea that was made on the advice of an attorney whose performance in so advising was below the level of representation mandated by the 6th

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The formula would work as follows: One-third (⅓) of a 35-year sentence would be eleven (11) years and eight (8) months. A person receiving the maximum amount of good-time credits possible (30 days additional credit for each 30 days actually served) would be credited with serving one-third (⅓) of a 35-year sentence at the end of 70 months or five (5) years and 10 months.

Amendment. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602 (1973). The appropriate standard to determine whether an attorney's performance is up to constitutional muster, in plea cases, is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). See *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985) (*Hill I*).

In *Hill I*, supra, the Supreme Court (while reviewing the instant case) reiterated its holding in *Strickland*. In order to establish an ineffective assistance of counsel claim, a defendant must show "that counsel's performance fell below an objective standard of reasonableness . . . (and) . . . that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Hill* 106 S.Ct. at 369. Richard N. Moore, Jr., an experienced criminal defense attorney, testified for Petitioner as an expert witness at the hearing.[5] Mr. Moore testified that investigation of the existence and impact of prior felony convictions upon a client's parole eligibility and sentencing possibilities is an essential element of providing competent legal representation in a criminal plea negotiation situation. There is no question that investigation is an essential part of the adversary process and that failure by an attorney to conduct investigation falls below the objectively reasonable standard of performance set forth in *Strickland*, supra, *Kimmelman v. Morrison*, ____ U.S. ____, 106 S.Ct. 2754 (1986); *Wade v. Armontrout*, 798 F.2d 304 (8th Cir. 1986); *Hudson v. Lockhart*, 679 F.Supp. 891 (E.D. Ark. 1986), affirmed ____ F.2d ____ (8th Cir. 1987 per curiam).

The magistrate finds that Petitioner's attorney did not know the impact of Act 93 upon Petitioner's eligibility for parole as a second offender, and that he incorrectly advised

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Mr. Moore is a past president of the Arkansas Association of Criminal Defense Lawyers, a former deputy prosecuting attorney, and holds memberships in the National Association of Criminal Defense Lawyers, the Association of Trial Lawyers of America, and the Arkansas Trial Lawyers Association.

Petitioner concerning parole eligibility in connection with a proposed plea of guilty without investigating the applicable law. [6] This conduct by the attorney was below the objective standard of reasonableness required of attorneys representing criminal defendants. Therefore, the first prong of the *Strickland* test is met.

The magistrate also finds that Petitioner would not have pleaded guilty but for the erroneous parole advice from his attorney; and that he was prejudiced by so doing because of the drastic difference between what he was led to expect and the reality of his parole possibilities. While it is true that parole is only a possibility, the application of rules allowing or disallowing parole consideration for significant periods of time can reach a constitutional magnitude. See *Bosnick v. Lockhart*, 283 Ark. 206, 677 S.W.2d 292 (1984) (applying an *ex post facto* analysis to Arkansas parole eligibility statutes). See also *Hill I*, 106 S.Ct. at 372 (concurring opinion).

It is, therefore, the magistrate's conclusion that the pleas of guilty entered by Petitioner on April 6, 1979, in the Pulaski County Circuit Court to the charges of murder and theft were invalid because the ineffectiveness of his attorney rendered them involuntary and unintelligent. Accordingly, the District Court should order the State of Arkansas to allow Petitioner to plead anew and to conduct a trial against Petitioner on the charges underlying his murder and theft convictions within ninety (90) days or the writ should issue.

/s/ John J. Foster, Jr.
UNITED STATES MAGISTRATE

DATE: June 28, 1988

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The Court notes that Act 93 had been in effect over two years when Petitioner entered his guilty plea on April 6, 1979.